



U.S. Department of Justice

United States Attorney
Eastern District of New York

271 Cadman Plaza East
Brooklyn, New York 11201
December 23, 2016

By ECF

Honorable Allyne R. Ross
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Janfeshan v. USCBP et al., CV-16-6915
(Ross, J.) (Mann, C.M.J.) (E.D.N.Y.)

Dear Judge Ross:

Defendants respectfully write to request that the Court issue an order stating that United States Customs and Border Protection ("CBP") may conduct a search of Plaintiff's cellphone, or in the alternative, set a briefing schedule for a motion that Plaintiff was ordered to file, but has not yet filed.

In his Complaint in this action, Plaintiff Hemad Janfeshan seeks to enjoin a border search of a cellphone that he was carrying when he arrived at John F. Kennedy International Airport ("JFKIA") on November 20, 2016. Plaintiff previously sought such relief by filing a motion for a preliminary injunction in *Janfeshan v. Kerry*, CV-16-4324 (Ross, J.) (Bloom, M.J.) (EDNY) ("*Janfeshan I*"). Plaintiff's complaint in *Janfeshan I* sought a travel document that would allow him to board a flight from Egypt to the United States. As a result of arrangements made under the supervision of Magistrate Judge Bloom, Plaintiff was allowed to board such a flight, and arrived at JFKIA on November 20, 2016, when CBP took custody of the cellphone in order to conduct a lawful border search of the cellphone. Plaintiff then moved in *Janfeshan I* for a preliminary injunction to prevent CBP from conducting the search.

At a conference in *Janfeshan I* on December 6, 2016, Your Honor suggested that CBP briefly refrain from conducting a search of the cellphone until the Court could rule on Plaintiff's objections to the search, and CBP agreed to Your Honor's suggestion. Transcript excerpts, Appendix A hereto, at 6-7. By Order in *Janfeshan I* dated December 6, 2016, Your Honor directed Plaintiff to commence a new action, and to file his preliminary injunction motion in that action. Minute Entry Order, Appendix B hereto. That order further directed Defendants to inform the Court of a timeline for responding to that motion. *Id.* At a conference held in *Janfeshan I* on December 9, 2016, Magistrate Judge Bloom ordered Plaintiff (1) to file the new action by December 14, 2016 and (2) to provide Defendants with additional information to support Plaintiff's claim that certain of the communications stored on the cellphone are subject to the attorney-client privilege. Transcript excerpts, Appendix C hereto, at 5-8, 20-21.

Plaintiff commenced the above action by filing a complaint on December 14, 2016. However, Plaintiff has not filed a motion for a preliminary injunction, or any other relief, in this action. In addition, Plaintiff has failed to provide Defendants with any additional information concerning his claim of privilege. In an effort to resolve these matters without burdening the Court, the undersigned sent two e-mails to Plaintiff's counsel yesterday. In response to the first e-mail, counsel claimed, in effect, that Plaintiff had complied with Your Honor's December 6th Order merely by filing a complaint in the above action. Counsel's e-mail did not address Magistrate Judge Bloom's Order. Counsel did not respond to the undersigned's second e-mail.

As a result of Plaintiff's failure to comply with Orders of this Court, CBP has been unable to begin a lawful border search of the cellphone. The brief delay contemplated by Your Honor has now lasted 17 days, and there is no indication of when that the delay will end.

Accordingly, Defendants respectfully request that the Court issue an Order providing that CBP may conduct a border search of the cellphone. In the alternative, Defendants respectfully request that the Court order Plaintiff to file his motion, and provide the information ordered by Magistrate Judge Bloom, no later than December 28, 2016; that Defendants file their response to the motion no later than January 5, 2017; and that the Court hold a hearing at its earliest convenience on or after January 6, 2017.¹

Respectfully submitted,

ROBERT L. CAPERS
United States Attorney

By: /s/ _____
ELLIOT M. SCHACHNER
Assistant U.S. Attorney
(718) 254-6053

cc:

Naz Ahmad, Esq.
Attorney for Plaintiff
(by ECF)

¹ By letter dated December 19, 2016 (Dkt. 8), Defendants requested that this action be reassigned from Chief Magistrate Judge Mann to Magistrate Judge Bloom. Plaintiff has not opposed that request.

APPENDIX A

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----x
4 HEMAD JANFESHAN,

5 Plaintiff,

6 versus

16 CV 4324 (ARR)

7 SECRETARY OF STATE JOHN KERRY, et al.,

8 Defendants.

U.S. Courthouse
Brooklyn, New York

9 -----x
10 December 6, 2016
11 11:10 a.m.

12 Transcript of Civil Cause for Telephone Conference

13 Before: HONORABLE ALLYNE R. ROSS,
14 District Court Senior Judge

15 APPEARANCES

16 Attorney for Plaintiff:
17 NAZ AHMAD, ESQ.

18 Attorney for Defendant:
19 SCOTT DUNN, ESQ.
20 ELLIOT SCHACHNER, ESQ.

21 Official Court Reporter:
22 MICHELE NARDONE, CSR, RPR, CRR
23 Phone: 718-613-2601
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1 authorities the proper procedure to protect.

2 My guess is what's going to come out of this
3 ultimately will be -- you know, I don't know what's in that
4 phone, but if there are many, many communications and there are
5 specific arguments about the specific communications there will
6 be, probably, a lengthy presentation of what's privileged and
7 why and there will be disputes about that, and the question is
8 how we generate that back and forth without forever harming an
9 attorney-client privilege; and I cannot imagine there isn't a
10 way of doing that.

11 MS. AHMED: Your Honor, this is Ms. Ahmad. I'm sure
12 Mr. Schachner and Mr. Dunn are aware of this. So currently CBP
13 policy contains some provisions when an individual claims that
14 their device contains attorney-client privilege information.
15 The key difference for us -- and I'm sure that your clerks
16 and/or Mr. Dunn and Mr. Schachner will have the same difficulty
17 I did -- is that most of the case law on this issue involves
18 motions to suppress. So where charges were brought after the
19 search was done, and the parties, you know, our client is a
20 party intending litigation.

21 THE COURT: I don't know what bearing that is
22 necessarily going to have on this. I know you have thrown it
23 into the brief, but it's not clear to me that the fact of a
24 pending litigation -- I mean, it doesn't mean any more than
25 that we would like to have the judge know what's going on about

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1 this.

2 MS. AHMED: Well, Your Honor, to the extent that any
3 of the communications concern the pending litigation, there is
4 obviously a risk no matter how, you know, good of a Chinese
5 wall, as you put it, they put up, that information will be
6 shared.

7 THE COURT: I'm sorry. I don't know, you know, there
8 is always that risk whether or not there is a pending
9 litigation. So I'm not sure what that adds to it. You may be
10 right. I'm not answering that question at all.

11 I'm just telling what you my preliminary thoughts are.
12 It does seem to me, though, that there ought to be a way of
13 litigating this before anything that a court would determine to
14 be privileged would get past the government's Chinese wall; and
15 what I would like to do, I think, is just get enough of a
16 response from the government so that I understand what we are
17 dealing with.

18 If it's heading where I think it is, which is not
19 just, you know, the government can look at everything versus
20 the government can look at nothing because we are going to give
21 the phone back, obviously something in the middle, where there
22 has to be a judicial determination as to whether or not
23 something is privileged, and, you know, should go to another
24 agency. Typically in these types of situations, I guess
25 analogous situations, I mean ultimately the government will be

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1 responsible to establish that insofar as there were privileged
2 communications they didn't get leaked.

3 I think it's ultimately going to have to be that type
4 of process, where a determination is made based on explanations
5 and reasons, none of which I have right now. I don't know
6 anything about this guy; I don't know what's privileged; I
7 don't know why he said certain names are privileged; I don't
8 know why pictures are privileged. Did he take pictures for his
9 lawyer and no one else? I mean, I just don't know what the
10 arguments are.

11 I do think that it would be appropriate, since this
12 has been going on for so long and since I think we can deal
13 with it relatively quickly, just to have customs hold off
14 briefly until we can sort out how we resolve the issue.

15 MR. DUNN: Judge?

16 THE COURT: Yes.

17 MR. DUNN: This is Scott Dunn. So a couple of
18 thoughts, if I might.

19 THE COURT: Absolutely.

20 MR. DUNN: So that's fine. The court's suggestion is
21 totally accepted by the government in terms of holding off.
22 The question is what time frame is the court looking at in
23 terms of --

24 THE COURT: It depends on what you get me. Maybe we
25 will know by tomorrow. Maybe we will know this afternoon.

APPENDIX B

30 mins
ID #: 154
D/F

CIVIL CAUSE FOR CONFERENCE:

BEFORE ROSS, J.

DATE: 12/6/2016

TIME: 11:30 a.m.

Docket No. 16-cv-4324

TITLE: *Hemad Janfeshan v. John Kerry, et al.*, 16-cv-4324

PLTFFS ATTY: Naz Ahmad
X present not present

DEFTS ATTY: Scott Dunn
X present _____ not present

COURT REPORTER: MICHELE NARDONE COURTROOM DEPUTY: D. LASALLE

OTHER

✓ CASE CALLED

_____ Conf. Adj'd to

Minute Entry for proceedings held before Judge Allyne R. Ross: The court held a telephonic conference on December 6, 2016 regarding plaintiff's motion for a temporary restraining order and preliminary injunction. As stated in the court's order dated December 6, 2016, plaintiff is directed to file his motion in a separate civil action, which may be related to the instant action. Defendants are directed to inform the court of a proposed timeline for responding to plaintiff's motion. The proposed schedule, as well as any opposition papers, should likewise be filed in the new civil action. Defendants agreed not to commence a search of plaintiff's cellular phone until the court resolves plaintiff's motion. At the suggestion of the parties, the motion in the new action will be referred to Magistrate Judge Lois Bloom. The preceding is set forth on the record.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HEMAD JANFESHAN,

Plaintiff,

v.

SECRETARY OF STATE JOHN
KERRY, et al.,

Defendants.

* * * * *

* Case No. 16-CV-4324 (AAR)

*

* Brooklyn, New York

* December 9, 2016

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TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE LOIS BLOOM
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:

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TARIK ISMAIL, ESQ.
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For the Defendants:

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4 Research Drive, Suite 402
Shelton, Connecticut 06484 (203)929-9992

1 MR. ISMAIL: Your Honor, if I can just weigh in on
2 this question, and I fully appreciate the Court's directive,
3 and, of course, Judge Ross's directive for us to file the
4 separate complaint. And our intention is to comply with that
5 order --

6 THE COURT: So --

7 MR. ISMAIL: -- as quickly as possible.

8 THE COURT: -- I'm giving you a deadline, because
9 we're not going to keep having --

10 MR. ISMAIL: We're happy to have a deadline, Judge.

11 THE COURT: -- hearings on a case that doesn't
12 exist.

13 MS. AHMAD: Yes. Your Honor, we weren't -- we were
14 not imagining that the phone issue would -- I -- the first
15 thing is --

16 THE COURT: How could you not imagine that the phone
17 issue would be a whole new can of worms here? They were just
18 going --

19 MS. AHMAD: But --

20 THE COURT: -- to agree with your point of view?

21 MS. AHMAD: Your Honor, we thought that this was the
22 natural venue to do it, because CVP confiscated his phone.

23 THE COURT: Venue is not the issue.

24 MS. AHMAD: Your -- to the extent that CVP
25 confiscated his phone upon his return --

1 THE COURT: Stop. If I might --

2 MR. ISMAIL: Judge, we have no problem with the
3 Court --

4 MS. AHMAD: Yeah.

5 MR. ISMAIL: -- setting a deadline for us to file
6 this complaint and we will file a new complaint on the phone
7 issue, which -- which we acknowledge.

8 While -- while especially relevant to a case in
9 which the adverse party is searching our client's phone, is a
10 separate issue --

11 MS. AHMAD: And --

12 MR. ISMAIL: -- and we'll file a --

13 MS. AHMAD: -- and we're not disputing that at all,
14 Your Honor. I -- we have --

15 THE COURT: Let me just tell you, Ms. Ahmad.

16 MS. AHMAD: Yes.

17 THE COURT: And you can be seated. I don't want to
18 be making this at all sound different than I intend it sound.

19 I complimented the attorneys in this case because I
20 thought for a problem for a person who was really in a
21 difficult situation that the attorneys in this room did an
22 incredible job in bringing this matter to a resolution.
23 So you must imagine how disappointed I am.

24 I understand that you said you couldn't commit to a
25 voluntary discontinuance. Your client wasn't here yet. You

1 didn't know. But we have every transcript.

2 I think I made myself clear that I expected if the
3 government went the extra mile, which they absolutely did, we
4 didn't know what would happen when Mr. Janfeshan landed in the
5 United States.

6 We had no idea whether he would be held or he would
7 be allowed into the country, but we agreed that if he was
8 brought back, that this case would be over.

9 And now, not only is it not over, you're bringing
10 TROs about separate matters. You are -- I haven't seen it,
11 but from Mr. Dunn's letter, you've given him a settlement
12 agreement, which would make you a prevailing party, and agree
13 to things beyond anything that the government ever said it
14 would agree to, and you're making an application for
15 attorney's fees to the Court. None of that -- moreover, none
16 of that was raised to the Court.

17 So when -- when people say that the government is
18 doing things not transparently, not moving in good faith, in
19 this particular instance, if the plaintiff's intended to try
20 to get them to redo their manual, or if they intended to move
21 for attorney's fees, you don't think that would have been
22 something you should have told me and Mr. Dunn before he went
23 through the efforts he did to get his client on that plane?

24 MS. AHMAD: Well --

25 THE COURT: Your client. I'm sorry.

1 MS. AHMAD: Yes.

2 THE COURT: Not his.

3 MS. AHMAD: So, first, Your Honor, if you want to
4 set a deadline for us to file a new action, please go ahead.

5 THE COURT: Very good. Let's do that first.

6 (Pause.)

7 THE COURT: How does Wednesday of next week look?

8 MS. AHMAD: Your Honor, could we have until the
9 following Monday? I was --

10 THE COURT: No. You're talking about the --

11 MS. AHMAD: Yeah. It's -- Your Honor, the only
12 reason I'm asking for more time is because Mr. Kassem is out
13 of the country and --

14 THE COURT: Again, you have another attorney with
15 you. You're filing papers. You've had a federal --

16 MS. AHMAD: Okay.

17 THE COURT: -- district --

18 MS. AHMAD: Yeah.

19 THE COURT: -- judge hear --

20 MS. AHMAD: All right.

21 THE COURT: -- TRO and say in an order that you need
22 to file a new separate action.

23 MS. AHMAD: Yes. Okay, Your Honor.

24 THE COURT: That was on the 6th. We are now at the
25 9th --

1 MS. AHMAD: Wednesday is fine. Wednesday is fine.

2 THE COURT: Wednesday, the 14th. Now, again, Ms.
3 Ahmad, I understand why your client has not voluntarily
4 discontinued this case, because you want to be able to raise
5 that there's a pending litigation for the purposes of saying
6 the attorney-client privilege on the phone.

7 MS. AHMAD: No. Your Honor, the reason we -- we did
8 not file the TRO in order to prolong this case. We file the
9 TRO because we have informed Mr. Dunn and CVP counsel that we
10 objected to their search of the phone, and they informed us
11 that they were going to proceed anyways, even --

12 THE COURT: And I saw all of that in the papers.

13 MS. AHMAD: Okay. So --

14 THE COURT: So I'm here to try to find solutions to
15 that case, because if we can find solutions to that case, then
16 maybe we don't have to have this separate action.

17 But I wanted to also give you the clear indication
18 that, again, this has been referred to my attention by Judge
19 Ross. Judge Ross gave you an order.

20 MS. AHMAD: Yes.

21 THE COURT: I was clear that you were supposed to
22 file your stipulation discontinuing the case.

23 MS. AHMAD: Yes.

24 THE COURT: That hasn't been done.

25 MS. AHMAD: Well, so, Your Honor, I think there was

1 MS. AHMAD: All right. Yes, Your Honor.

2 THE COURT: I've asked you to consider it. I
3 haven't asked you to say yes to it today.

4 So, Mr. Dunn, is there anything that you want to put
5 on the record at this point?

6 MR. DUNN: No.

7 THE COURT: And are you present in the next several
8 weeks, because I imagine there is going to be a new complaint?

9 MR. DUNN: Yes.

10 THE COURT: Okay. And so I've given you until the
11 14th to file the new action, and then any of the requests will
12 be filed under that new action.

13 And you've heard -- let me just have it on the
14 record, Mr. Dunn, on behalf of the agency, you can affirm that
15 they will not do any searches until this matter is resolved,
16 even if it's in the new matter before the Court has ruled.

17 MR. DUNN: Yes.

18 MR. ISMAIL: And, Your Honor, we'll take as a
19 bookend, then, on the -- on the dismissal question, the 21st
20 deadline that the Court had originally set. If that's -- if
21 that's okay.

22 THE COURT: Yes. I would -- I would love for them
23 to be at the same time.

24 MR. ISMAIL: We'll do everything we can.

25 THE COURT: I would.

1 MR. ISMAIL: Yeah.

2 THE COURT: Because that way it's clean and we know
3 what we're doing going forward.

4 Again, I want people to be thinking about ways to
5 solve the next issue.

6 MS. AHMAD: Yeah.

7 THE COURT: I don't know what you're thinking is the
8 next issue, Ms. Ahmad, but I'm thinking the phone is the next
9 issue.

10 I've done some reading about suggestions. Again, my
11 aim here is to get you both to think about an acceptable
12 protocol for determining whether there is attorney/client
13 privilege matters on the phone.

14 And let me just say, in my mind, plaintiff is the
15 one who would have to supply more information. I don't know
16 whether that would be one bit or 40 bits of information, but
17 you listed a list of people. I know some of those people. I
18 don't know all of those people.

19 And there should be a corresponding date and time
20 that those people would know that they spoke to him or that
21 they sent something that they would assert as privileged.

22 So there should be ways that we could --

23 MS. AHMAD: Yeah. Yeah. We're not -- we're not
24 disputing that, Your Honor. We're happy to figure that out in
25 a way you suggest. That's --

1 THE COURT: Well, I'm telling you to think about
2 that now, because, again, I don't want the next case, which I
3 really don't know what the basis is for the next case.

4 Usually these disputes arise within the context of a
5 criminal case and I understand they don't have a search
6 warrant. It was a search at the border. I understand we're
7 in a different sort of context.

8 But if what you want to do is protect information
9 that's on his phone, it's not going to be that the Court is
10 going to never let the government look at the phone --

11 MS. AHMAD: Yes, Your Honor. We did not imagine
12 that --

13 THE COURT: So let's --

14 MS. AHMAD: -- at all.

15 THE COURT: -- try to figure out --

16 MS. AHMAD: Yes. Your -- that is --

17 THE COURT: -- a protocol --

18 MS. AHMAD: -- that is what we envisioned, Your
19 Honor.

20 I will just add that we don't want steps -- we don't
21 want what we -- what we accomplished during the case to be
22 considered a waiver of claims with respect to his
23 naturalization. That's all.

24 THE COURT: Again, the case that you brought was
25 about him returning to the United States.